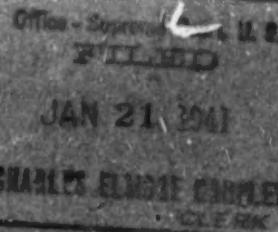


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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 709

J. H. WOOD AND J. H. KNOWLTON,
Appellants,
vs.

T. S. LOVETT, Jr.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ARKANSAS.

STATEMENT AS TO JURISDICTION.

J. G. Bunker,
Counsel for Appellants.

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IN THE SUPREME COURT OF ARKANSAS

J. H. WOOD AND J. H. KNOWLTON,
Appellants,
vs.

T. S. LOVETT, JR.,
Appellee.

JURISDICTIONAL STATEMENT.

The appellants, J. H. Wood and J. H. Knowlton, in compliance with Rule 12 of the Rules of the Supreme Court of the United States, as adopted February 13, 1939, hereby state the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment of the Supreme Court of Arkansas entered in the above entitled cause on October 21, 1940, upon which rehearing was denied November 11, 1940, said basis being as follows:

This case is one in which the validity of a statute of the State of Arkansas, to-wit: Act 264 of the Acts of the General Assembly of the State of Arkansas for 1937, Vol. 1, page 933, which statute was approved March 17, 1937, is drawn into question by appellants upon the ground that said statute is repugnant to Paragraph 1, Section 10, Article I of the Constitution of the United States, and is also repugnant to Section 1 of the Fourteenth Amendment to the Constitution of the United States. The final decision of the Supreme Court of Arkansas, being the court of the last resort in all causes in the State of Arkansas in which a decision could be had, is in favor of the validity of the

statute. Therefore, in accordance with the rules of the Supreme Court of the United States, the petitioners, appellants J. H. Wood and J. H. Knowlton, respectfully show this Court that the case is one in which under the legislation in force when Act of January 31, 1928 (45 Stat. L. 54), was passed, to-wit: under Section 237 (a) of the Judicial Code (28 U. S. C. A. Section 344), a review could be had in the Supreme Court of the United States on a writ of error as a matter of right.

The statute of the State of Arkansas, the validity of which is here involved is Act 264 of the Acts of the General Assembly of Arkansas for 1937, Vol. 1, page 933, the material provision of which is as follows:

"Section 1. That act 142 of the Acts of 1935 be, and the same is hereby repealed."

The only other provision in the Act is the emergency clause which is not here material. Act 142 of the Acts of the General Assembly of Arkansas for the year 1935, Vol. 1, page 402, approved March 20, 1935, which was repealed by the aforesaid act, provides as follows:

"Section 1. Whenever the State and County Taxes have not been paid upon any real or personal property within the time provided by law, and publication of the notice of the sale has been given under a valid and proper description, as provided by law, the sale of any real or personal property for the non-payment of said taxes shall not hereafter be set aside by any proceedings at law or in equity because of any irregularity, informality or omission by any officer in the assessment of said property, the levying of said taxes, the making of the assessor's or tax book, the making or filing of the delinquent list, the recording thereof, or the recording of the list and notice of sale, or the certificate as to the publication of said notice of sale; provided, that this Act shall not apply to any suit now pending seeking to set aside any such sale, or to any

suit brought within six months from the effective date of this Act for the purpose of setting aside any such sale."

The remainder of the act is the emergency clause which is not here material.

The date of the judgment sought to be reversed herein is October 21, 1940, and rehearing was denied November 11, 1940, and this application for appeal is presented December 16th, 1940.

The nature of the case is as follows: The lands involved are situated in Desha County, Arkansas. In 1933 the Alliance Trust Company, from whom the appellee, T. S. Lovett, Jr., acquired his alleged title, failed to pay taxes due the State of Arkansas, and on June 12, 1933, the time fixed by law, the lands were sold at public sale and struck off to the State of Arkansas by the collector of taxes in the absence of private bidders. After the expiration of the period of redemption allowed by law, the lands were deeded to the State on July 18, 1936. On March 20, 1935, the General Assembly of the State of Arkansas passed Act 142 of 1935, which is set out above, and the act became immediately effective. The effect of the act was to cure such defects as existed in the tax sale in Desha County in which these lands were sold and to provide that this sale should not thereafter be set aside by any proceedings at law or in equity. On July 20, 1936, the appellant, J. H. Knowlton, purchased 106.66 acres of these lands from the State of Arkansas, obtaining a deed from the Commissioner of State Lands as provided by law, conveying the East Half, East Half, Northeast Quarter of Section 19, and the East Half, Southwest Quarter of Section 17, all in Township 7 South, Range 2 East, Desha County, Arkansas. On July 29, 1939, J. H. Wood purchased from the State of Arkansas 240 acres of these lands, obtaining a deed from the Commissioner of State Lands, as provided by law, conveying to him the Northwest

Quarter and the West Half, Southwest Quarter of Section 17, Township 7 South, Range 2 East, Desha County, Arkansas. At the time of these conveyances the said Act 142 of the Acts of the General Assembly of Arkansas for 1935 was in full force and effect. Subsequently, on March 17, 1937, the General Assembly of Arkansas attempted to repeal Act 142 of 1935 by Act 264 of 1937, set out above. On January 10, 1939, appellee T. S. Lovett, Jr., acquired the deed from the Alliance Trust Company purporting to convey the lands to him, and on January 21, 1939, appellee brought suit against the appellants, Wood and Knowlton, in the Chancery Court of Desha County, Arkansas, for the purpose of canceling the deeds from the Commissioner of State Lands to each of the appellants and obtaining confirmation of title to the lands. Appellants answered in due course, asserting among other defenses that by virtue of Act 142 of the General Assembly of Arkansas for 1935 all defects in the tax sale under which they had derived their titles were cured and that they had acquired a good title from the State of Arkansas by their respective deeds while said Act was in full force and effect, and that Act 264 of the Acts of the General Assembly of Arkansas for 1937, if construed retroactively, so as to affect appellants' titles by repealing the aforesaid Act 142 of 1935, is unconstitutional as impairing the obligation of contracts contrary to Article 1, Section 10 of the Constitution of the United States, and as denying to appellants equal protection of the laws and depriving them of their property without due process of law, in contravention of the Fourteenth Amendment to the Constitution of the United States. Other lands and other issues not involving constitutional questions were also presented.

Trial in the Chancery Court of Desha County, Arkansas, resulted in a judgment in favor of appellee, the plaintiff below, the trial court ruling that the constitutional question presented by appellants' pleadings had been decided con-

trary to that contention by a previous decision of the Supreme Court of Arkansas. On appeal to the Supreme Court of Arkansas this judgment was affirmed on the ground that the rights acquired by appellants by their purchase from the State of Arkansas while the said Act 142 of the General Assembly of Arkansas for 1935 was in effect were not vested rights protected by the Constitution of the United States. Petition for rehearing asserting the constitutional questions was denied.

It is contended that the questions involved in this appeal are substantial because the effect of the judgment of the Supreme Court of Arkansas is to uphold a statute of the State of Arkansas, the said Act 264 of the Acts of the General Assembly of Arkansas for the year 1937, against an attack made on said Act by appellants on the ground that it contravened Article I, Section 10 of the Constitution of the United States and the Fourteenth Amendment to the Constitution of the United States. By the construction placed on the Act by the Supreme Court of Arkansas, the said Act 264 retroactively divests from the appellant, J. H. Wood, title to 240 acres of valuable land, to which previously to the passage of said Act he had a good and valid title, and in the same manner, the said Act divested from the appellant, J. H. Knowlton, title to 106.66 acres of valuable land to which he had previously a good and valid title. It is contended by appellants that their purchase of said lands from the State constituted a contract between themselves and the State of which the provisions of Act 142 of the Acts of the General Assembly of Arkansas for 1935, which was then in effect, became a part, and that the subsequent repeal of said Act, without notice to appellants or the opportunity to be heard or any day in court, deprived them of their property without due process of law, denied them the equal protection of the law and impaired the obligation of their contracts with the State of Arkansas. The

validity of the said Act 264 of the Acts of the General Assembly of Arkansas for 1937 has never been decided by any decision of this Court or any appellate Federal court to date.

The constitutional questions here involved were first raised by the following statement made in the separate answers filed by appellants, Wood and Knowlton, in the Chancery Court of Desha County on May 13, 1939:

"For further defense, defendants state that the defects and irregularities alleged in the complaint as to the tax sale, by virtue of which defendant acquired his title, even if such defects existed, which is not admitted, were of such nature that they were cured by Act 142 of the Acts of the General Assembly of Arkansas for 1935, which was in effect when defendant acquired his title. Said Act had the effect of curing defendant's title and vesting the same in defendant, and creating a vested right which could not thereafter be disturbed."

Subsequently, the appellants, Wood and Knowlton, for the purpose of more specifically raising the constitutional questions filed an amendment to their answers on December 12, 1939, and stated:

"Defendants further state that if Act 264 of 1937 should be construed to be retroactive, the same would impair and destroy the vested rights obtained by these defendants under Act 142 of 1935 by virtue of their deeds from the State Land Commissioner, and said Act 264 of 1937 is unconstitutional and beyond the powers of the General Assembly for the following reasons:

* * * * *

4. It impairs the obligation of contract created by the grant of the State of Arkansas to these defendants, in violation of Article I, Section 10, of the Constitution of the United States.

5. It deprives these defendants of their property without due process of law in contravention of the

Fourteenth Amendment to the Constitution of the United States."

The trial court, the Chancery Court of Desha County, in a written opinion made a part of its decree, passed upon the constitutional questions, as follows:

"Defendants further plead that since their purchase of the lands from the State was effected at a time when Act 142 of the 1935 session was in full force and effect, the faults that rendered the tax sale void was cured, and for that reason they obtained a vested interest in the land which could not be destroyed by Act 264 of the 1937 Legislature that repealed Act 142. Our Supreme Court has passed upon this identical question contrary to defendants' contention."

A decree was rendered in favor of the appellee, the plaintiff below. On appeal to the Supreme Court of Arkansas, the court of last resort in Arkansas, that court passed upon the constitutional question with the following statement.

"We think appellants acquired no greater vested interest or title to said lands than the State had, and the repeal of said Act 142 violated no constitutional right of theirs to the defense under Act 142 after its repeal."

The decree of the trial court was affirmed.

The said Supreme Court of Arkansas, the court in the last resort in all cases in the State of Arkansas, rendered its decision on October 21, 1940, in an opinion by the Honorable E. L. McHaney, and affirmed the judgment theretofore rendered by the Chancery Court of Desha County. The opinion of the Supreme Court of Arkansas has not yet been officially reported but is unofficially reported in *Wood, et al. v. Lovett*, 143 S. W. (2d) 880 (Advance sheets). A copy of the opinion of the Supreme Court of Arkansas is hereto attached, marked exhibit "A" and made a part hereof.

The following cases are relied upon by appellants as sustaining the jurisdiction of the Supreme Court of the United States:

Fletcher v. Peck, 6 Cranch 87, 3 L. Ed. 162.

Poindexter v. Greenhow, 114 U. S. 270, 29 L. Ed. 185, 5 S. Ct. 903 & 962.

Pacific Mail Steamship Co. v. Joliffe, 2 Wall. 450, 18 L. Ed. 805.

Davis v. Gray, 16 Wall. 203, 21 L. Ed. 447.

Pennoyer v. McConaughly, 140 U. S. 1, 35 L. Ed. 363, 11 S. Ct. 699.

Missouri Pacific RR. Co. v. Nebraska, 164 U. S. 403, 41 L. Ed. 489, 17 S. Ct. 130.

Nable v. Union River Logging R. Co., 147 U. S. 165, 37 L. Ed. 123, 13 S. Ct. 271.

Respectfully submitted,

(S.)

J. G. BURKE,
Attorney for Appellants,
Helena, Arkansas.

EXHIBIT "A".**IN THE SUPREME COURT OF ARKANSAS.****No. 117.****Wood, et al.,****v.****LOVETT.****October 21, 1940.****McHANEY, J.:**

This action was instituted by appellee against appellants to cancel the State's tax deeds issued to them, conveying the State's title to the lands described in each of three deeds, for rents and to quiet title in him. The action was begun on January 21, 1939. The complaint alleged that he was the owner of all the lands therein described, by virtue of a deed from the Alliance Trust Company in 1939, which is of record in Desha county, and that said Trust Company acquired title thereto by virtue of the foreclosure of a deed of trust executed by a former owner, which deed is of record, and that his predecessors in title have owned, occupied and paid taxes thereon for nearly a century. The land forfeited in 1933 for the non-payment of the 1932 taxes and was sold to the State. Not having been redeemed, it was certified to the State, and, in 1936, the State conveyed to appellants the three separate tracts here involved, except appellant Harris got his deed from the State in 1938. The complaint alleged ten different reasons why the forfeiture and sale to the State was void, unless cured by Act 142 of 1935. Separate answers denied the allegations of the complaint and raised the questions herein discussed.

Trial resulted in a decree for appellee in which the rents and profits owed by appellants was offset against their improvements and rendered judgments in favor of each appellant for taxes paid. As to certain of the lands—some 53 acres—it is agreed by appellants the forfeiture and sale were void for insufficient description.

For a reversal of the decree against them appellants first say that appellee has not proved title in himself. On this question the record discloses that appellee testified that he had purchased the land from the Alliance Trust Company and introduced his original deed which was handed to the notary and was copied as an exhibit to his testimony. He also introduced an abstract of title showing title in himself and his predecessors in title from the Government down to himself, including a commissioners deed executed and approved in the foreclosure and sale to said Trust Company. A similar practice was followed by appellants who introduced their original tax deeds from the State as exhibits to their depositions which were copied and the originals withdrawn. No objection was made by appellants in the court below as to the manner of proof of ownership of appellee until February 16, 1940, on the very day the court rendered its decree, but on that date they filed exceptions thereto. These exceptions were overruled in its decree by the court without giving any reasons therefor, but the court might well have done so because they came too late,—just as the case was submitted, whereas appellee's deposition was taken on July 15, 1939. We think the court was justified in overruling the exceptions for this reason, if for no other. We think the objection now urged is as the form of the proof and does not go to the merits of the controversy. The abstract shows title in appellee and it would work a substantial injustice to reverse the case because appellee failed to introduce the record of his deed and other muniments of title. Moreover, this is not a suit in ejectment where title must be derived from the Government, the State or a common source.

Appellants next contend that their title was confirmed and perfected by reason of Act 142 of 1935. This Act was repealed by Act 264 of 1937, and this suit was not filed until January 21, 1939. It is conceded that the tax sale to the State in 1933, is void unless cured by said Act 142, but, it is contended, that said Act cured the defects and irregularities alleged in the complaint, and that the State took a good and indefensible title except the tract without a valid description, because of said Act, which passed to appellants on their purchase from the State; that they acquired vested

rights in said lands, and that if the repealing Act is so construed as to give a retroactive effect as to rights vested before passage, it is unconstitutional and void under both the State and Federal constitutions. It is conceded by appellee that the defects and irregularities alleged are such as would not justify the court in setting the tax sale aside under said Act 142 if it were in force. We think the fallacies in the argument of appellants consist in the false assumptions that said Act 142 cured defects and irregularities in all tax sales occurring prior to the passage of the repealing Act 264 in 1937, and that appellants acquired vested rights under said Act 142, having purchased said lands in 1936, prior to its repeal. Said Act 142 provided that under conditions stated, "the sale of any real or personal property for the non-payment of said taxes shall not hereafter be set aside by any proceedings at law or in equity because of any irregularity", etc., with a proviso the Act should not apply to suits then pending or to those brought within six months after the effective date of the Act for the purpose of setting aside such sales. Under its own terms the Act did not apply to all sales,—to pending suits and those which might be brought within six months. The Act does not profess to cure tax sales, but only that tax sales shall not be set aside by the courts because of certain irregularities and informalities, naming them. Prior to the passage of said Act 142 the court had been setting aside tax sales because of the irregularities and informalities named therein. The Act was held valid in *Carle v. Gehl*, 193 Ark. 1061, 104 S. W. 2d 445. In *Kosek v. Walker*, 196 Ark. 656, it was held, to quote a headnote, that: "Upon the passage of Act 264 of 1937, repealing Act 142 of 1935, tax sales became subject to any attack upon them to which they were open prior to the passage of Act 142 of 1935, except where the sales were being litigated when the repealing Act 264 of 1937, was passed."

Appellants attempt to distinguish *Kosek v. Walker* from this, because, in that case, the land was certified to the State and sold by it after the repealing Act 264 was enacted. We think this fact would make no difference, for if the sale in this would be cured by said Act 142, it would have been cured in that also, as the sale in that case was made in 1934,

prior to the passage of said Act 142, and no suit was brought in this case, attacking said Act until nearly two years after its repeal. As said in *Kosek v. Walker*, supra, "The infirmities of the tax sale herein involved were, therefore, not cured by Act 142, and appellant's contention that Act 142 is still effective as to all tax sales made prior to the passage of said Act 264 cannot be sustained. Upon the passage of Act 264 tax sales became subject to any attack upon them to which they were open prior to the passage of Act 142 except only those sales which were being litigated when the repealing Act 264 was passed."

We think appellants acquired no greater vested interest or title to said lands than the State had, and the repeal of said Act 142 violated no constitutional right of theirs to a defense under Act 142 after its repeal. As above stated said Act did not profess *in haec verba* to be a curative Act, but only that the courts should not set aside tax sales for the infirmities mentioned under the conditions stated therein.

Two other questions are argued, one relating to limitations under the plea of possession for two years and the other to the question of betterments. Both were decided against appellants on evidence that is in dispute, which we have carefully considered, and we are unable to say the findings of the trial court thereon are against the preponderance of the evidence.

The decree is accordingly affirmed.

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